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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1978
No.

EDWARD F. CLARK, JR., County Executive, and THE BOARD OF CHOSEN FREEHOLDERS,

Petitioners,

vs.

HON. THOMAS S. O'BRIEN, Assignment Judge of the Superior Court and JOHN J. DEGNAN, Attorney General of New Jersey on Behalf of Respondent,

---

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW JERSEY SUPREME COURT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 19

No.

EDWARD F. CLARK, Hudson County Executive, and THE BOARD OF CHOSEN FREEHOLDERS, Petitioners

vs.

HON. THOMAS S. O'BRIEN, Assignment Judge of the Superior Court and JOHN J. DEGNAN, Attorney General of New Jersey on Behalf of Respondent

The petitioner, Edward F. Clark, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New Jersey Supreme Court entered in this proceedings on January 23, 1979.

OPINION BELOW

The opinion of the New Jersey Supreme Court, not yet reported, appears in the Appendix hereto. The New Jersey Supreme Court affirmed the decision of the New Jersey Appellate Division in a two line opinion. The New Jersey Appellate Division decision also appears in the Appendix hereto.

JURISDICTION

The jurisdiction to review the decision of the New Jersey Supreme Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the legislative and executive branches of the County government of a State are to be afforded procedural due process when the state juridicary invokes its "inherent powers doctrine" to compel financing for court needs.

2. Whether the federal decisions on the separation of powers in the United States Constitution and the federal delineations of the separation of powers doctrine are controlling when the State constitution expressly copies the federal system of checks and balances.

3. Whether the separation of powers principle should be held applicable to the states as a matter of constitutional law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

a) Separation of Powers Guarantee;
Legislative, Article I, Section 1 to 9;
Executive,
Article II, Section 1 to 4; Article III,
Section 1 to 3.
Fourteenth Amendment.

New Jersey Constitution:

Distribution of The Powers of Government,
Article III, paragraph 1 (Separation of
Powers)

New Jersey Statutes:

Optional County Charter Law, Article III,
County Executive Plan, N.J.S.A. 40:41A-1 and
40:41A-31 et seq.

County Executive (executive branch)

N.J.S.A. 40:41A-33; Duties N.J.S.A. 40:41A-36;
Powers
N.J.S.A. 40:41A-37

Freeholder Board (legislative branch)

Legislative Power of County, N.J.S.A. 40:41A
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County Clerk

N.J.S.A. 40A:9-77 Compensation of deputy,
county clerks; chief clerks and other person-
nel.

New Jersey Court Rules:

1969 as amended

R. 1:33-3 Assignemnt Judges

(a) Duties

STATEMENT OF THE CASE

This case arose out of the Assignment Judge of the Superior Court of Hudson County's plan to reorganize the Assignemnt function which controls the court's calendar (under N.J. Court Rule 1:33-1 et seq.). In implementation of this court reorganization, the Assignment Judge selected 16 court clerks to operate the new calendar system. The Assignment Judge's court clerks or ancillary judicial personnel are provided by the office of the constitutionally elected County Clerk. New Jersey Statute 40A:9-74 provides that the County Clerk shall select and employ clerks necessary to assist the courts of the County. Compensation for the ancillary judicial personnel is to be fixed by the Board of Chosen Freeholders upon the recommendation of the County Clerk (N.J.S.A. 40A:9-77).

Under N.J.S.A. 40:41A-33, the County adopted the "County Executive Plan of Government" which provides that the County Executive, the federal equivalent of the executive branch of the government shall "prepare and submit to the Board for its consideration . . . an operating budget." N.J.S.A. 40:41A-36. The legislative power or the power of the purse is vested in the Board of Freeholders under N.J.S.A. 40:41-38 et seq.

The Assignment Judge irrationally demanded from the County pay raises for his court clerks far in excess of that negotiated by other clerks similiarly situated. When negotiations broke down, on June 8th, 1975, the Assignment Judge issued an order to show cause to Edward Clark, the County Executive and the Board of Chosen Freeholders as to why he should not receive the salary increases for his personnel. The order to show cause was returnable June 15th, 1978 in the Assignment Judge's court room before him personally.

On June 15 and 22, 1978, the Assignment Judge conducted hearings of sorts or what was better described by the New Jersey Appellate Division as a "gratuitous gesture." 161 N.J. Super. at 489, 391 A2d 1255, 1258 (1978). Despite allegations of impropriety and conflict of interest, the Assignment Judge refused to disqualify himself. Under the inherent powers doctrine of the courts, the Assignment Judge decided he had the power to compel the legislative and executive branch to appropriate additional monies for salary increases. An appeal was taken to the New Jersey Appellate Division and the New Jersey Supreme Court. Strangely enough, both courts also concluded he was right and affirmed.

Under the threat of contempt of court for disobeying a court order, the Board of Freeholders appropriated and the County Executive disbursed the additional public funds necessary to cover the judicially mandated salary increases.

HOW FEDERAL QUESTION IS PRESENTED

This case arose out of an order to show cause entered by the Assignment Judge on his motion. At the hearings on June 15th and 22nd, 1978, the County Counsel on behalf of the County Executive and the Board of Chosen Freeholders objected to the Assignment Judge hearing his own case. (1T9-16 to 1T10-14). Furthermore, the County Counsel argued at the hearings that the judiciary does not have the power to legislate monies for itself because judicial legislation violates the "separation of powers" doctrine and our system of "checks and balances". (1T14-24 to 1T15-19; 2T17-9 to 2T19-11).

The Assignment Judge ruled under the inherent powers doctrine of the courts that he had the power to determine what funds are necessary for court needs and the power to compel the executive and legislative branches of the government to provide such funds. (2T41-12 to 2T42-10). The Assignment Judge noted,

> Mr. Krieger (the County Counsel) correctly points out that this case involves a question of the doctrine of separation of powers. (2T29-13 to 15).
>
> . . . the cases generally take the view that the ultimate inherent power of the Courts to compel the payment of their reasonable necessary expenses. . . (2T39-10 to 13)
>
> As a general rule the cases have upheld the inherent powers of the Courts to obtain

> at public expense, necessary court employees or attendants. (2T39-18 to 23).
>
> . . . the court has the authority to do what it proposes to do, most reluctantly. (2T40-20 to 21).

An appeal was immediately taken as of right to the New Jersey Appellate Division where the County of Hudson's brief argued in Point II that the separation of powers clause of the New Jersey and Federal constitution was violated by the Assignment Judge and in Point IV the failure of the Assignment Judge to disqualify himself violated procedural due process. (Petitioner's brief at pages 17 and 36). On August 4, 1978, the New Jersey Appellate Division issued a written opinion in which the court ruled that separation of powers principle and procedural due process was not violated. In Re Matter of the Court Reorganization Plan of Hudson County, 161 N.J. Super. 488, 490, 391 A2d 1255 1257-58 (1978). (A copy of the opinion is appended hereto as required).

On October 4th, 1978, the New Jersey Supreme Court granted petitioner's petition for certification. The County of Hudson's petition for certification adequately briefed the federal constitutional issues in question 3, 4, and 5 of the petition. The New Jersey Supreme Court on January 23rd, 1979 in a per curiam two line opinion affirm-

ed the judgment below for the reasons expressed in the Appellate Division opinion. (The New Jersey Supreme Court opinion is attached hereto in the appendix).

Thus it is abundantly clear that the federal constitutional question was timely and properly raised. New York ex. rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); Oxley State Co. v. Butler County, 166 U.S. 648, 655 (1897).

REASONS FOR GRANTING THE WRIT

PRELIMINARY STATEMENT OF THE ISSUES INVOLVED

This petition for a writ of certiorari challenges the constitutionality of the "inherent powers" of the state courts to compel funding for ancillary personnel.

This case raises substantial federal questions of whether the judiciary in autonomously determining its own budget and then ruling on the propriety of its decision violates procedural due process as guaranteed by the fourteenth amendment. This matter also questions whether the judiciary in legislating its own budget violates the delicate checks and balances of the separation of powers as guaranteed by the United States Consittution and especially where the state constitution models the federal separation of powers principles.

The determination of the issues in this matter are of vital interest to the Fifty States of the Nation. The power of the purse issue in determination of court budgets has attracted national attention. See Hazard, McNamara, and Sentilles, "Comment, Court Finance and Unitary Budgeting," 81 Yale Law Journal 1286 (1972); Annotation, "Inherent Power of Court to Compel Appropriation or Expenditure of Funds for Judicial Purposes," 59 ALR 3d 569, "Judicial Power - The Inherent

Power of the Courts to Compel Funding for Their Own Needs - 53 Washington Law Review 331 (1978); Comment, "State Court Assertion of Power to Determine and Demand Its Own Budget", 120 Pennsylvania Law Review 1187 (1972). C. Baar, Separate but Subservient: Court Budgeting in the American States (1975); Brennan, Judicial Fiscal Independence, 23 U. Fla. L. Rev. 277 (1971); J. Burke, The Inherent Powers of the Courts, 57 Judicature 247 (1974); J. Connors, Inherent Power of the Court - Management Tool or Rhetorical Weapon? 1 Justice System J. 63 (1974); Note, Judicial Financial Autonomy and Inherent Power". 57 Cornell L. Rev. 975 (1972); Constitutional Law, The Inherent Power of the Courts to Appripriate Money for "Reasonably Necessary" Expenditures, 55 Marquette L. Rev. 392 (1972); Comment, Inherent Power and Administrative Court Reform, 58 Marquette L. Rev. 133 (1975); Comment, Courts - Judge's Power to Bind Contractually County Treasury for Courtroom Necessities, 7 Suffolk U.L. Rev. 1136 (1972).

POINT I

THE JUDICIARY DENIED THE COUNTY OF HUDSON PROCEDURAL DUE PROCESS

The decision below raises the novel question of the extent of procedural due process to be accorded the legislative and executive branch of the government when the judiciary invokes the alleged "inherent powers" doctrine to compel financing for court needs.

Within traditional due process standards, there has been a seizing of property. cf. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). However, in this case the property was public taxpayers' monies of the County of Hudson. The seizing of the funds was done by the judiciary under its "inherent powers". Moreover, the seizure was accomplished without "due process of law" and "just compensation".

The orders entered by the Assignment Judge were directed to a member of the County Executive's staff --the Comptroller of the Currency. The County Executive was forced by the judiciary to disburse county revenues for the salary increments under the threat of contempt for disobeying a court order. Thus, the County Executive had no choice but to ultimately appropriate funds necessary to comply with the Assignment Judge's orders.

The court below skirted the issue of the denial of a full and fair hearing and the adamant refusal of the Assignment Judge to disqualify himself from hearing his own case. First, the New Jersey Appellate Division incorrectly ruled "(t)he hearing itself was not mandated by the due process requirements of proceedings involving adjudications between litigants." 161 N.J. Super. 483, 489, 391 A2d 1255, 1258 (1978). Affirmed 73 N.J. 498, 396 A2d 1144 (1979). The New Jersey court characterized the actions of the Assignment Judge as "administrative". Furthermore, the court ruled that the hearing which was not a "hearing" yet preserved the right of appeal was a "gratuitous gesture". Id. at 489. Secondly, the court concluded that Judge O'Brien need not disqualify himself from his own motion and his own case because he was acting in an "administrative function". In re Court Reorganization Plan of Hudson County, supra. at 488-489.

This Court has recognized that due process is not only applicable to criminal proceedings but to administrative hearings as well. Goldberg v. Kelly, 397 U.S. 254 (1969), Bell v. Burson, 402 U.S. 535 (1971). Therefore, the N.J. Appellate Court's characterization of the hearing as purely administrative does not remove it from the ambit of procedural due process.

It is well settled that parties whose rights are to be affected are entitled to be heard. Fuentes v. Shevin, 407 U.S. 67, 80 (1972), Baldwin v. Hale, 1 Wall. 223 (1864). The basic function of procedural due process is to afford an "opportunity to be heard at a meaningful time and in a meaningful manner" (Fuentes v. Shevin, supra.) thereby promoting fairness and accuracy in the resolution of disputes.

The Court has placed enormous weight on securing the neutrality of due process hearing. The right to an impartial decision-maker is required by due "process in every case". Arnett v. Kennedy, 416 U.S. 134, 197 (1974). It has been held that the Court will disqualify decision makers even who, in fact, have no actual bias if they might reasonably appear to be biased. Goldberg v. Kelly, 397 U.S. 254, 211 (1970).

It is axiomatic that procedural due process dictates that the Assignment Judge should have disqualified himself from the hearing. It has been firmly established since the common law that no man can be a judge of his own case. Bonham's Case, 8 Coke 13b.77 Eng. Reprint 646, Tumey v. Ohio, 273 U.S. 510 (1927); Ward v. Monroeville, 409 U.S. 57 (1972).

Furthermore, even in other jurisdictions which have dealt with the inherent powers doctrine have held that fundamental fairness dictates that cases as sub judice should be conducted by a disinterested party. In the matter of the Salary of the Juvenile Director, 552 P. 2d 163, 173 (Sup. Ct. of Washington, 1976). Moreover, in view of the dangers of the inherent powers doctrine, other prominent jurisdictions have applied a high standard of proof. Commonwealth ex rel Carroll v. Tate, 274 A2d 193 (1971), Leahey v. Farrell, 66 A2d 577 (1949), In re Haberstroh, 340 A2d 603 (1975), Judges for Third Judicial Circuit, 190 N.W. 2d 228 (Michigan, 1971). Both of these factors were glaringly absent from the instant case.

POINT II

THE DECISION BELOW VIOLATES THE DELICATE CHECKS AND BALANCES OF THE SEPARATION OF POWERS AS PROVIDED FOR BY THE UNITED STATES CONSTITUTION AND INCORPORATED BY THE NEW JERSEY CONSTITUTION

The decision below affirmed the power of the Assignment Judge to order pay raises for his Administrative Staff. 161 N.J. 483 (1978) 391 A2d 1255 (1978) affirmed 78 N.J. 498 (1979), 396 A2d 1144 (1979). In sustaining the power of the judiciary to compel financing for its ancillary personnel, the New Jersey Courts unconstitutionally misinterpreted the separation of power concept of the U.S. and State Constitutions. The Appellate Division incorrectly ruled,

> "Under the basic principle of separation of powers underlying our State and Federal Governments this judicial power must be untrammeled and independent of interference by the other branches of government, executive or legislative. Despite this doctrine of separation of powers, however, the functioning of government defies practical implementation by the creation of watertight compartments for each branch of government. (citations omitted).
>
> * * *
>
> "It follows that a court, and in this case the Assignment Judge in his administrative capacity, has the inherent power to provide the facilities, personnel and resources reasonably necessary for the performance of the judicial functions in the county. And as a corollary thereof he must have the power to compel the appropriation and expenditure of funds by the coequal executive and legislative branches of government to accomplish

such purpose, subject only to bounds of reasonable discretion. See Hazard, McNamara and Sentilles, "Court Finance and Unitary Budgeting," 81 Yale L.J. 1287-1291 (1972);" 161 N.J. Sup 483, 490-491.

In one of the leading articles on the use of "inherent power" for court financing erroneously cited in the Appellate Division opinion, commentators Hazard, McNamara and Sentilles noted that expansion of the inherent powers doctrine to the degree in New Jersey would,

> "raise significant constitutional and political difficulties. The only available source of financial support for the courts is tax revenue in the hands of other governmental units. The judiciary has no power of the purse: For the courts autonomously to tax on a systematic basis would be clearly objectionable on constitutional grounds. The taxing power is vested in the legislature, as checked by the veto of the executive; so is the power of appropriation. A judicial requisition of funds from a taxing agency, such as a county or city is in essence a judicial arrogation of discretion conferred." Court Finance and Unitary Budgeting, 81 Yale L.J. 1286, 1289(1972)

The significant constitutional question alluded to in the Yale Law Journal and the destruction of the tripartite structure of government is the reason this petition for certiorari is being filed. In Leahey v. Farrell 66 A2d 577, 579(1949) the Pennsylvania Supreme Court aptly described the pre-

vaing allocation of power among the three branches:

> "Control of State Finances vests with the legislature, subject only to constitutional limitations (citation omitted). The function of the judiciary to administer justice does not include power to levy taxes in order to defray the necessary expenses in connection herewith. It is the legislature which must supply such funds.

The separation of powers concept is basic to our concept of constitutional government. Although fundamental to our system it is not explicitly mentioned in the U.S. Constitution but there implicitly. National Insurance Co. v. Tidewater, 337 U.S. 582, 590-591 (1949). The doctrine was promoted by the Framers of the Constitution to protect the liberty of the people and to safeguard "the independence of each branch of the government and protect it from domination and interference by the others." Chester J. Antieau, Modern Constitutional Law, (1969); Vol. II p. 200. See also W. Gwyn, The Meaning of the Separation of Powers, (1965) at 110, which traces the doctrine of Baron De Montesquieu. In the seminal case on the separation of powers, Mr. Justice Douglas concurring in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 629, quoted Justice Brandeis for the proposition that:

> "The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

This Court has stressed many times that the judiciary must have respect for the doctrine. Each of the departments is restricted to the exercise of its appointed powers and as a logical corollary, "Each department should be kept completely independent of the others . . . each shall never be controlled by or subjected, . . . to the coercive influences of either of the departments." O'Donoghue v. U.S., 289 U.S. 516, 530 (1933).

The separation of powers principle was recognized in the early State Constitutions. See M.J.C. Vile, Constitutionalism and the Separation of Powers, (1967) at pg. 133. Six of the original States incorporated the theory into their revolutionary constitutions. William O. Douglas, The Autonomy of Liberty, The Rights of Man Without Force (1963) at pg. 54. New Jersey was one of the first States to adopt separation of powers into its Constitution. M.J.C. Vile, Constitutionalism and the Separation of Powers, at pg. 133.

While the doctrine of separation of powers is not explicitly incorporated into the Constitution of the United States, it is expressly provided for in Article III, Sec. 1 of the New Jersey Constitution, which states:

> 1. The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

The Constitution of many of the States also presently embody the Federal constitutional principle. See Matter of the Juvenile Director. 552 P2d 163, 168 (Washington, 1976).

The New Jersey Supreme Court has stated on numerous occasions that the separation of powers doctrine applicable to the Federal Government is also applicable to the N.J. State Government. Brown v. Heyman, 297 A2d 572, 577 (1977); Eggers v. Kenney, 104 A2d 10 (1954). In David v. Vesta Co., 212 A2d 345, 357 (1965), the New Jersey Supreme Court declared,

> "The doctrine of separation of powers is a fundamental principle of American government, experssly provided for in the constitutions of many states, and implied in almost all the others and in the federal government for the creation of three separate branches of government."

See also footnote 9 at p. 357 which traces the history of separation of powers in N.J. In Brown v. Heyman, supra., 279 A2d at 577, the New Jersey Supreme Court noted that the N.J. Constitution is identical to the federal scheme in its delicate distribution of power among the three branches.

Where the States voluntarily adopt the Federal distribution of governmental powers, the United States Supreme Court and Federal Court decisions govern the definitions of the Federal separation of power scheme.

In Mayor of City of Philadelphia v. Educational Equality League, 415 U.S. 605, 94 S. Ct. 1323 (1973). This Court stated that: "(T)he Constitution does not impose on the States any particular plan for the distribution of governmental powers." Id at 615, N. 13. However, it is important to emphasize that while the States are free to adopt any form of State Government, the above cited case cautioned "(t)his is not to say, of course, that the State of Pennsylvania may not pattern its government after the scheme set forth in the Federal Constitution or in any other way it sees fit." 415 U.S. at 614, N.13. Thus the States are clearly free to adopt the Federal separation of powers scheme.

Moreover, the County of Hudson is not unmindful

of the fact that States have interpreted analogous provisions of State Constitutions differently from the United States. For example, in Serrano v. Priest, 557 P2d 929 (Calif. S. Ct. 1977), despite the fact that State constitutional equal protection clause was the "substantial equivalent" of the Fourteenth Amendment, the California Supreme Court held the California public school financing unconstitutional even though the U.S. Supreme Court held a similar school finance system constitutional in San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) under Federal standards. Similarly in New Jersey in State v. Johnson, 68 N.J. 349, (1975) 346 A2d 66, the New Jersey Supreme Court held that it could impose higher standards, in effect disagreeing with Schneckloth v. Bustamonte, 412 U.S. 218 (1973) under the New Jersey Fourth Amendment which is identical to the U.S. Constitution Amendment Four. See also Cooper v. California, 386 U.S. 58, 62 (1967).

However, no United States Supreme Court opinion has specifically addressed the issue of whether the States may interpret a Federal constitutional principle different from the United States Supreme Court. In Johnson v. Louisiana, 406 U.S. 356, 376 (1972), Justice Powell in his concurring opinion

intimated in some dictum that the States are free to experiment with procedural implementation of the right to jury trial despite demands for national uniformity. But in Argersinger v. Hamlin, 407 U.S. 25 (1972), the United States Supreme Court struck down the Supreme Court of Florida's interpretation of the Sixth and Fourteenth Amendments right to counsel (236 So2d at 443). The United States Supreme Court reversed applying the "federal standard" and held that no person may be subjected to imprisonment unless secured the right to counsel. 407 U.S. supra at 28.

It is submitted that the Federal interpretation must control, otherwise, as in the separation of powers principle, we would have a situation where 50 States would be defining the Federal concept.

Research on the novel question of State incorporation of a Federal constitutional principle sheds very little light on the subject. However, Professor Laurence H. Tribe of Harvard Law School in his learned treatise (1978) at pg. 133 of American Constitutional Law has posited:

> "If a State has incorporated Federal law into its own law, as by declaring a violation of a Federal regulatory statute to be negligence, per se. See e.g., Crane v. Cedar Rapids & I.C. Ry., 395 U.S. 164 (1969); Moore v. Chesapeake & O. Ry., 291 U.S. 205 (1934); the question of whether

> the Supreme Court can review the State Court's interpretation of the incorporated Federal law becomes more substantive. By incorporating Federal law, the state does not necessarily forfeit its interest in an autonomously developing legal system: State legislatures may have adopted Federal law not because it wished to relieve its own courts of the task of dynamic interpretation, but because it concluded that the larger body of case law to which its courts would obtain access would increase the precision with which its courts would determine which of a number of interpretations best fit changing local circumstances. On the other hand, federal lawmakers may have an interest in assuring the uniform interpretation of federal standards: If the federal standard operates by its own force to regulate private conduct, for example, variant state interpretations, even if they do not actually conflict with the federal interpretation, may confuse individuals seeking to conform to federal standards, or encourage individuals wishing to circumvent federal law, and thus complicate federal law enforcement. Inevitably, therefore, the Supreme Court, in deciding whether it has jurisdiction to review state court interpretations of hybrid state law, must perform what is essentially a supremacy clause analysis: the Court must decide whether state autonomy threatens federal interests to such an extent that uniformity must prevail."

The Constitution is the supreme law of the land upon all subjects which it speaks. Odgen v. Saunders, 12 Wheat 212 (1827), Ex Parte Siebold, 100 U.S. 371, Dodge v. Woolsey, 18 How 331, McCulloch v. Maryland, 4 Wheat 316, Millker v. Bradley, 418 U.S. 717 (1974). Therefore, the separation of powers and principle of the U.S. Constitution is incorporated by the N.J. Constitution.

It was recognized by the Court that the courts

must not interfere with the rights and duties of the executive branch of the government. Kendell v. U.S., 12 Pet. 524, 619, 9 L Ed 1181 (1838), Decatur v. Paulding, 14 Pet. 497, 515. In denying a mandamus by Captain Stephen Decatur's widow upon the Secretary of the Navy, to order pension monies, Chief Justice Taney stated, "The interference of the Courts with the performance of the ordinary duties of the executive departments of government would be productive of nothing but mischief; and we are satisfied that such power was never intended to be given to them." Decatur v. Paulding, supra at 515.

In Keim v. U.S., 177 U.S. 290, 298 (1879), later reaffirmed the limited judicial role concept when it struck down a federal employee's suit to be judicially reinstated.

Accordingly, the separation of powers as guaranteed by the Federal Constitution and incorporated by the N.J. State Constitution was violated by the pay raise orders of the Assignment Judge. The fundamental recognition of distribution of powers between the three branches of government mandates that the judicial system is prohibited from intervening in the executive department of government. Decatur v. Paulding, supra. See Keim v. United States, supra. See also Green v. Frazier, 253 U.S.

233 (1920). The ability of the judiciary to intervene in the exclusive powers of another branch of government under the inherent powers doctrine is clearly without federal constitutional precedent.

Furthermore, this Court has twice held in two important cases that one branch of government may not encroach upon the exclusive powers of another. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) and U.S. v. Nixon, 418 U.S. 683, 707 (1974).

In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593-94 (1952), Justice Frankfurter, concurring in the Court's invalidation of President Truman's steel seizure stated:

> "Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded -- too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power. It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley. The accretion of dangerous power does not come in a day. It does come, however, slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."

It is the function of the judiciary to determine what the law is and not the taxes and appropri-

ations.

"(I)t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch 137, 176 (1803). U.S. v. Nixon, 418 U.S. 683, 703 (1974). Our system of government allows the Federal Courts to interpret the Constitution in a manner at variance with the construction given the document by another branch. Powell v. McCormack, 395 U.S. 486, 549 (1969).

As this Court stated in Baker v. Carr, 369 U.S. 186, 211 (1962):

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation and is the responsibility of this Court, as ultimate interpreter of the constitution.

Thus, it is entirely proper for this Court to enforce the separation of powers doctrine.

POINT III

THE SEPARATION OF POWERS PRINCIPLE SHOULD BE HELD APPLICABLE TO THE STATES AS A MATTER OF CONSTITUTIONAL LAW.

The Assignment Judge's Order compelling the two branches of government to appropriate pay raise orders would be clearly unconstitutional if the separation of powers doctrine was held applicable to the States under the Fourteenth Amendment.

The case presents a prime example for the argument that the separation of powers principle should be guaranteed to the states. In debating the adoption of Article IV, Section 4 (Republican form of government-protection to the states), Governor Randolph expressed concern "because a republican government must be the basis of our National Union, and no state in it ought to have it in their power to change its government into a monarchy." Yates Minutes quoted from J. Elliott, 1 Debates on the Federal Constitution 406 (1836). Another founding father, Thomas Jefferson noted concern for undesired legislative supremacy as a "Capital defect" leading to despotic government in the revolutionary constitution of Virginia. T. Jefferson, Notes on the State of Virginia 120 (W. Peden ed. 1960).

In the case sub judice there is the unusual situation where there is not a state

"monarchy" as Randolph feared, or a "despotic legislative supremacy" as feared by Jefferson but "judicial tyranny". The judiciary in New Jersey has decided the propriety of its own encroachment into taxation and spending. The New Jersey Supreme Court and the Appellate Division strangely enough decided that the Assignment Judge was right in compelling public funds for pay raises for ancillary personnel. The issue here is the right of the executive and legislative branches of the government to determine the quantum of pay raises for the judiciary's support personnel. Although it could have, the County of Hudson never constitutionally questioned the Assignment Judge's need for the personnel. The County of Hudson never refused to pay salaries for the staff. The County of Hudson merely took the position that it had the constitutional responsibility to determine the amount of salary increases. The power of the purse or control of finances rests with the legislature and ultimately with the people. U.S. Constitution, Article I, Sections 8 and 9; N.J. Constitution, Article IV, Section 6, Paragraph 1. The people of the County of Hudson, through their elected representatives, have petitioned the highest court in New Jersey to redress the wrong inflicted by the judiciary. The gross disregard of the right of the

people to be free from judicial autocracy is the reason the County of Hudson has come to the highest court of the land. The County of Hudson has simply nowhere else to seek relief but with the United States Supreme Court.

The case which rang the death knell for the proposition that the Republican form of government does not embody the separation of powers guarantee is Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937) in which Justice Cardozo stated,

> "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."

Id. at 612. The underpinning of the decision is that the enforcement of the Republican form of government under Article IV, Section 4 "is for Congress, not the courts." Highland Farms Dairy, supra., at 612. Therefore, because it is well settled that there is no judicial enforcement of the republican form of government guarantee (Luther v. Borden, 7 How. 1 (1849, U.S.), if the separation of powers principle is to be applicable to the states it must be through the Fourteenth Amendment.

In examining the applicability of the separation of powers doctrine to the states it is important to discuss United States v. Brown, 381 U.S.

437 (1965) which held Sec.504 of the Labor Management Reporting and Disclosure Act of 1959 making it a crime to be a worker of the Communist Party and executive board of a labor organization to be a Bill of Attainder and therefore, unconstitutional. The majority found constitutional history demonstrated that "the Bill of Attainder clause was as a narrow, technical (and, therefore, soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function or more simple - trial by legislature". Id. at 442 (emphasis added). Justice White hypothesized in his dissent of U.S. v. Brown that "if Article I, Sec. 9, cl. 3 immortalizes same notion of the separation of powers at the federal level, then Article I, Sec. 10 necessarily does the same for the states". Id. at 473. But Justice White criticized this line of reasoning by noting it has long been recognized by this Court that

> "(w)hether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. Dreyer v. Illinois, 187 U.S. 71, 84; accord, e.g., Reetz v. Michigan, 188 U.S. 505, 507; Carfer v. Caldwell, 200 U.S. 293, 297; Sweezy v. New

Hampshire, 354 U.S. 234, 255 (Warren, C.J., announcing judgment), 256-257 (Frankfureer, J., concurring), 268 (Clark, J., dissenting). U.S. v. Brown, supra at 473."

Harvard Law Professor Laurence Tribe, in his learned treatise American Constitutional Law (1978) at 493 cryptically noted that the cases cited by Justice White in support of the Dreyer v. Illinois, view,

> "suggest only that the particular pattern of interbranch relationship employed in the federal government need not be copied by each state, not that a state would be any freer than the federal government to inflict deprivations upon identified persons by popular vote, by the sort of log-rolling process that is characteristic of representative assemblies, or indeed by any process that circumvented the safeguards of adversary hearing and judicial review". 187 U.S. 71.

Professor Tribe concluded after reviewing all the cases cited to support the proposition that the doctrine of separation of powers does not apply to the states that "(t)here is . . . no real support in the cases for the proposition that a state legislature can assume fully judicial powers" Id. at 493. It is also submitted that there is no support for the view that a state judiciary can assume legislative powers, i.e. matter of fiscal responsibility (taxation, appropriation and spending).

Clearly, the separation of powers doctrine was held not to apply to the states by the first Justice

Harlan in 1902 in the case of Dreyer v. Illinois, 187 U.S. 71, 84. In Dreyer, petitioner challenged the Illinois Interdeterminate Sentence Act as violating the separation of powers of the Illinois Constitution and the due process clause of the Fourteenth Amendment. While not referring to Article IV, Section 4, Justice Harlan stated the distribution of powers among the three branches of the Illinois State government does not "present any question under the due process clause of the Fourteenth Amendment." The underpinning of the decision was a quote by Story that "the whole power of one of these departments should not be exercised by the same bonds which possess the whole power of either of the departments; and that such exercise of the whole would subvert the principles of a free constitution." Id. at 84. Exactly what Story has stated about separation of powers has occurred in N.J. The "whole powers" of the other branches has been wrongfully exercised by the judiciary in N.J.

Dreyer has been followed in Reetz v. Michigan, 188 U.S. 505 (1903), (which upheld the power of the States to determine the qualifications of physicians); Carter v. Caldwell, 200 U.S. 293, 297 (1906), (denying a writ of habeas corpus to a prisoner held in contempt by an investigative committee of a

legislature) and Sweezy v. New Hampshire, 354 U.S. 234 (1957).

The Dreyer v. Illinois holding has been reaffirmed by this Court but essentially with no more analysis that the ipse dixit assertion that distribution of powers among the branches of State government has not been extended to the States. Hughes v. Superior Court, 339 U.S. 460, 467 (1950). In Sweezy v. New Hampshire, 354 U.S. 234, 255, this Court said in dictum that the "concept of separation of powers embodies in the United States Constitution is not mandatory in State governments". The most discussion of whether the separation of powers principle is applicable to the State was in Justice Frankfurter's concurrence where he also stated in dictum:

> "It would make the deepest inroads upon our Federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the Forty-Eight States."

Id. at 256.

The separation of powers doctrine is the dominant principle of the American political system. Kilbourn v. Thompson, 103 U.S. 168 (1880), Myers v. U.S., 272 U.S. 2 (1926), Monaco v. Mississippi, 292 U.S. 313 (1934), and U.S. v. Nixon, 418 U.S. 683 (1974). Because the separation of powers principle is so pervasive in our scheme of government, it

should be enforceable against the States as a matter of the constitutional law. Virtually all of the Fifty States embody the concept in their State Constitutions. For example, see:

1. Montgomery v. State, 231 Ala.1,163 So365(1935). 2. Hawkins v. Governor, 1 Ark. 570. 3. Abbott v. McNutt, 218 Cal. 225, 22 P2d 510(1933). 4. Denver v. Lynch, 92Colo. 102, 18 P 2d 907(1933). 5. Norwalk Street R. Co's Appeal, 69 Conn. 576, 37A 1080(1897). 6. Fla. Nat'l Bank v. Simpson, 59 So2d751(1952). 7. In Re Speer, 53 Idaho 293, 23P 2d 239 (1933). 8. Winter v. Barett, 352 Ill. 441,186 N.E. 113(1933). 9. State v. Shumaker, 200 Ind.716, 164 N.E. 408 (1929). 10. State v. Barker, 116 Iowa 96, 89 N.W. 204 (1902). 11. In Re Sims, 54 Kan. 1, 37P. 135 (1894). 12. Rouse v. Johnson, 234 Ky 473, 28 S.W. 2d745(1950). 13. State v. Warmoth, 22 La. Ann. 1. 14. State Ex Rel Young v. Butler, 105 Me.91,73A560(1909). 15. Harris v. Allegany County, 130 Md. 488, 100A733(1917). 16. In Re Opinion of Justices, 279 Mass. 607, 180 N.E. 725 (1932). 17. Anway v. Grand Rapids R. Co., 211 Mich. 592, 179 N.W. 350(1920). 18. American State Bank v. Jones 184 Minn. 489,239N.W. 144 (1931). 19. Univ. of Mississippi v. Waugh, 105 Miss. 623, 62 So827 (1913). 20. State Ex Rel Hadley v. Washburn, 167 Mo. 680, 67S.W. 592 (1902). 21. Veto Case, 69 Mont. 325, 222P. 428 (1924). 22. Tyson v. Washington County, 78 Neb. 211, 110 N.W. 634 (1906). 23. State v. Roy, 40 N.M. 397, 60P. 2d 646 (1936). 24. State Ex Rel Atty. Gen'l. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915). 25. State Ex Rel Dusher v. Watland, 51N.D. 710, 201 N.W. 680 (1924). 26. Saratoga Springs v. Saratoga Gas, 191 N.Y. 123 83 N.E. 693 (1908). 27. Zanesville v. Zanesville Tez. 64 Ohio St. 67, 59N.E. 781 (1901). 28. Riley v. Carter, 165 Okla. 262, 25 P2d 666 (1933). 29. Macartney v. Shipherd, 60 ok 133, 117 P.814 (1911). 30. Shapp v. Sloan, 27 Pa. Cmnwlth 312 367 A2d 791 (1976). 31. Henry v. Cherry, 30R.I.13, 73 A 97 (1909). 32. Bialock v. Johnson, 180 S.C. 40, 185 S.E. 61 (1936). 33. State El Rel Richards v. Cohisman, 36 S.D. 260, 154 N. W. 707 (1915). 34. Langever v. Miller, 124 Tex. 80, 76SW 2d 1025 (1934). 35. State v. Fleming, 7 Hump. (Tenn.) 152. 36. Kimball v. Grantsville City, 19 Utah 368, 57P.1 (1899). 37. Sabre v. Rutland R. Co., 86 Vt. 347, 85A 693 (1913). 38. State v. Huber, 129 W. Va. 198, 40SE 2d 11 (1946) 39. Public Serv. Comm. v. Grimshaw, 49 wyo. 158, 53 P2d 1 (1936) 40. State v Thompson, 149 Wis. 488, 137 N.W. 20 (1912). 41. State v. Fabri, 98 Wash. 207, 167 P. 133 (1917).

Thus, it would not make the deepest inroads upon our Federal system to hold this basic principle applicable to the States because it is already voluntarily incorporated. The vitality of the doctrine will be strengthened by extending it to the States because there will be only one meaning of the doctrine espoused by this Court.

The doctrine of the separation of powers along with the theory of checks and balances formed the basis of the United States Constitution. See M.J.C. Vile, Constitutionalism and the Separation of Powers, 18-19 (1967). The earlier proponents of the separation of powers doctrine formulated the theory as a safeguard against tyranny. Its essence was once described by Montesquieu:

> All would be lost if the same man or the same body of leaders, either of nobles or of the people, exercised these three powers: that of making laws, that of executing the public resolutions, and that of judging criminals and civil cases. (From W. Gwyn,

The Meaning of the Separation of Powers, 110 (1965).

> When the legislative and the executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. (From the Spirit of the Laws, Book XI, c.6.

The Framers of the Constitution felt the separation of powers was necessary to protect the liberty of the individual and to safeguard the independence of each branch of the government by protecting it from domination and interference by the others. This Court has acknowledged that the separation of powers protects the liberty of the citizen from a dangerous accumulation of power in the trustee of governance. See Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952), and O'Donogue v. U.S., 289 U.S. 516 (1933). In another important case it was noted: "(b)y these mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority." United Public Works v. Mitchell, 330 U.S. 75 (1947).

It is submitted the doctrine of the separation of powers is so "implicit in our concept of ordered liberty" and so "rooted as to be fundamental" that it should be held applicable to the States by its own force or under the due process

clause of the Fourteenth Amendment. Thus, Dreyer v. Illinois, supra, should be overruled.

The separation of powers doctrine mandates three mutually exclusive branches, each entirely free from interference by the others. Numerous decisions have stated that the three branches of government are totally distinct and autonomous and that the separation of powers principle bars actions by one branch that even indirectly impinges upon another. Humphrey's Executor v. United States, 295 U.S. 602, 629-30 (1935), O'Donoghue v. United States, 289 U.S. 516, 530 (1933), and Springer v. Government of the Philippines, 277 U.S. 189, 201 (1928). See also Myers v. United States, 272 U.S. 52, 167 (1926).

The integrity and independence for each branch of government requires respect for the doctrine of separation of powers. O'Donoghue v. U.S., supra. One branch of government cannot "encroach upon the domain of another without danger." Sinking Fund Cases, 99 U.S. 700, 718 (1879).

Accordingly, the acts of the Assignment "legislating" monies for his staff would be held unconstitutional.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New Jersey Supreme Court.

Respectfully submitted,

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